IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27-04-2007

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE J.A.K. SAMPATH KUMAR

W.A.NOs.1202, 1208 OF 1997, 1165 & 1166 OF 1998

W.A.Nos.1202 & 1208/1997

1. U.K. Subramaniam ..Appellant No.1 in WA.1202/1997.
2. T. Govindaraju
3. A.M.P. Jamaludeen
4. S. Balakrishnan
5. R.Amirthavalli
6. K. Indira
7. G. Devarajan
8. R. Kasthuri
9. S.H. Saleem Unnisa .. Appellants 2 to 9 in WA.No.1202 and 1 to 8 in WA.No.1208/97.

Vs.

1. Tmt.N. Meenakshi
   W/o.B.V. Venkatasubramanian .. Respondent No.1 in WA.No.1202/1997

2. Tmt.B. Saraswathy,
   W/o.T.K. Ganesan .. Respondent No.1 in WA.No.1208/1997

2. The Secretary,
   Legislative Assembly Secretariat,
   Fort St. George, Madras 9. .. Respondent No.2 in both WAs

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W.A.NOs.1165 of 1998, 1166/98:

The Secretary,
Legislative Assembly Secretariat,
Fort St. George,
Chennai 9. .. Appellant in WA. Nos.1165 & 1166/1998

Vs.

1. N. Meenakshi, .. Respondent No.1 in WA.No.1165/1998
2. B. Saraswathi .. Respondent No.1 in WA.No.1166/1998
3. U.K. Subramaniam ..Respondent No.2 in WA.1165/1998.
4. T. Govindaraju
5. A.M.P. Jamaludeen
6. S. Balakrishnan
7. R.Amirthavalli
8. K. Indira
9. G. Devarajan
10. R. Kasthuri
11. S.H. Saleem Unnisa ..Respondents 3 to 10 in WA.1165 and 2 to 10 in WA.1166/98.

Writ Appeals filed under Clause 15 of the Letters Patent against the common order dated 19.9.1997 passed in W.P.Nos.17084 and 17085 of 1993 filed under Article 226 of the Constitution of India, praying this Honourable Court to issue a Writ of Certiorarified mandamus calling for the records of the first respondent relating to G.O.Ms.NO.190, Legislative Assembly Secretariat dated 16.9.1992 and the connected letter of the first respondent to the petitioner in No.1002/93-5 TNLA[OP-1] dated 20.7.1993 respectively and quash the same so far as the petitioner is concerned and direct the first respondent to treat the petitioner respectively as senior to respondents 2 to 10 and 2 to 9 respectively in the category of Senior officer with consequential right to promotion to the higher post.

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For Appellants in WA.1165 & 1166/98 : Mr.R. Viduthalai
Advocate General
Assisted by Mr.Edwin Prabhakar

For Appellants in WA.1202 & 1208/97 : Mrs. Rita Chandrasekaran
Mr.V. Kalyanaraman for
M/s. Aiyar & Dolia

For Respondent-1 in : Mr.S. Vadivel &

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all WAs. Mr.P. Chandrasekar

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COMMON JUDGMENT

P.K. MISRA, J

The Tamil Nadu Legislative Assembly Secretariat Service Rules have been framed in exercise of power conferred under Clause (3) of Article 187 of the Constitution of India and such Rules came into force on 24.3.1955. As per Rule 2(1), a person is said to be "appointed to the service" when, in accordance with the rules applicable, he discharges for the first time the duties of a post borne on the cadre of the service or commences the probation or training prescribed for the members thereof. As per Rule 3, the permanent cadre of the service and of each class and category thereof shall be determined by the State Government. As per Rule 4, the service shall consist of the classes and categories of officers specified. Clause II consists of Non-Gazetted Superior posts. Category 1 of such Class II is Section Officers and Category 1A is Section Officer, Delegated Legislation. Category 5 consists of Assistant Section Officers and Category 6 consists of Assistants. As per Rule 6, appointment to the service in different classes and categories shall be made in accordance with the methods and in the order of preference made against each category in Appendix II. For Class II, category 1 Section Officers, the method of appointment is promotion from category 5 of Class II i.e., promotion from Assistant Section Officers or transfer from Category I-A of Class II, i.e., Section Officers Delegated Legislation. Similarly for Class II category 1A, i.e., Section Officer Delegated Legislation, recruitment is by promotion from the category 5 of Class II or by transfer from Category 1 of Class II i.e., from Section Officer. For Appointment to Assistant Section Officer, which is Category 5 in Class II, the method of appointment is promotion from category 6, 7 or 8 of Class II or by transfer from any other service or by direct recruitment.

1.1 It appears that a decision was taken by virtue of G.O.Ms.No.1059 dated 2.7.1960 for bifurcation of Legislative Department into Legislative Assembly and Legislative Council Department. Such position continued till the abolition of the Legislative Council with effect from 31.10.1986. During the continuance of two separate establishments, Smt.N. Meenakshi, the petitioner in W.P.No.17084 of 1993 and Smt.B. Saraswathi, the petitioner in W.P.No.17085 of 1993, were recruited and appointed to the Secretariat of the Legislative Council. Smt. Meenakshi was promoted as Assistant on 22.4.1977 and Smt. Saraswathi was promoted as Assistant on 15.12.1978. Subsequently, such posts were redesignated as Assistant Section Officers. They were continuing as such in such capacity until the abolition of the Legislative Council with effect from 31.10.1986. Similarly the appellants in W.A.Nos.1202 and 1208 of 1997 had been appointed in similar capacities in the Secretariat of the Legislative Assembly. Since the Legislative Council was to be abolished, a High Level Committee had been constituted to suggest ways and means regarding the

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employees of the Secretariat of the Legislative Council. By S.O.Ms.No.244 dated 31.10.1986, sanction was accorded for the employment of additional officers and staff to attend to the increase in work and also due to the abolition of the Legislative Council. The relevant portion of the order is to the following effect :-

"After careful consideration, sanction is accorded for the employment for a period of one year from the date of appointment or till the necessity ceases, whichever is earlier of the following additional Officers and Staff in the Legislative Assembly Secretariat to attend to increase in work load in the Secretariat consequent on the constituent of certain new committees in the Legislative Assembly and also to attend to additional work that may devolve on this Secretariat due to the abolition of the Legislative Council:

. . .

6. Section Officers .. 3 (Three)
(Rs.1160-50=-1460-70-1950/-)

7. Assistant Section Officer .. 6 (Six)
(Rs.780-35-1025-40-1385) "

1.2 On the same day, S.O.Ms.No.245 was issued keeping in view the S.O.Ms.No.244. The said order is being relevant, extracted in extenso :-

"ORDER:-

In the S.O. Read above orders have been issued for the creation of certain posts of additional officers and other staff to attend to increase in work load in the Secretariat. It has been decided to fill the above posts from among the officers and staff of the Legislative Council Secretariat consequent on the abolition of the Legislative Council.

2. In exercise of the powers conferred under Rule 47 of the Tamil Nadu Legislative Assembly Secretariat Service Rules, the Governor of Tamil Nadu in consultation with the Hon. Speaker, relaxes Rule 6 with the Appendix II of the Tamil Nadu Legislative Assembly Secretariat Service Rules favour of those listed in the Annexure to this order and accordingly the officers and staff specified in Column I of the Annexure to this order are appointed in the posts of Column II of the said Annexure with effect from 1.11.1986 forenoon.

3. The persons so appointed from the Legislative Council Secretariat consequent on the abolition of the Legislative Council will constitute a separate unit in the Legislative Assembly Secretariat for purpose of seniority, promotion etc. Necessary Amendments to the Tamil Nadu Legislative Assembly Secretariat Service Rules in this regard and also ad-hoc rules for the posts for which such rules are necessary will be issued separately."

1.3 Annexure to the said order contains the names of the Officers and staff in the Legislative Assembly Secretariat appointed in the Legislative Assembly Secretariat with effect from 1.11.1986. Three Assistant Section

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Officers in the Legislative Council Secretariat, namely, Smt.S. Vijayalakshmi, Smt.N.Meenakshi andSmt.B. Saraswathi, were posted as Assistant Section Officers in the Legislative Assembly Secretariat.

1.4 Thereafter, on 17.5.1988, Smt. Meenakshi was promoted and appointed as Section Officer temporarily, but subsequently, she was reverted as Assistant Section Officer for want of vacancy. Ultimately, Smt. Meenakshi was re-appointed as Section Officer on 31.5.1989 and by order dated 8.8.1989, her services as Section Officer were regularised with effect from 17.5.1988. Similarly, Smt.Saraswathi was promoted as Section Officer temporarily on 27.6.1989, but was reverted and then appointed as Section Officer on 12.7.1990.It is not disputed that appellants in W.A.Nos.1202 and 1208 of 1997, who were initially appointed in the Legislative Assembly Secretariat and had continued as such, were promoted as Section Officers in 1991 and thereafter.

1.5 While the matter stood thus, S.O.Ms.No.190 was issued on 16.9.1992. Such order purported to fix inter-se seniority of Tamil Nadu Legislative Assembly Secretariat. After referring to S.O.Ms.No.244 dated 31.10.1986, S.O.Ms.No.245 dated 31.10.1986 and other similar orders, the order was issued regarding fixation of seniority in several categories including that of the Section Officer. The relevant paragraphs are extracted hereunder :-

> "2. The appointment of the Personnel of the Legislative Council Secretariat, rendered surplus to requirements in the Legislative Assembly Secretariat, will not fall under any of the recognised methods of recruitment. The decision to keep them as a separate unit for purposes of promotion, seniority, etc., is also not supported by any rule. Much administrative inconvenience could have been avoided if timely decision had been taken regarding the transfer of the staff of the erstwhile Legislative Council Secretariat instead of resorting to temporary arrangements. It is possible that such a decision would have been taken in the expectation that the Legislative Council would be revived.
>
> 3. The Government have since taken a policy decision not to revive the Legislative Council. It has, therefore, become an urgent necessity to decide the question of transfer of the personnel of the erstwhile Legislative Council Secretariat rendered surplus to requirements and to fix their inter-se seniority vis-a-vis the personnel of the Legislative Assembly Secretariat keeping in view the provisions contained in rule 20 of the Tamil Nadu Legislative Assembly Secretariat Service Rules.
>
> 4. The normal consequence of the abolition of the Legislative Council would have been the retrenchment of the Officers and staff of the Legislative Council Secretariat rendered surplus to requirements, but a humanitarian view was taken and it was decided to give them suitable positions in the Legislative Assembly Secretariat and certain departments of

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Secretariat. Even if such persons had been appointed on transfer immediately after the abolition of the Legislative Council, they would have been placed below the junior most person in the respective categories as on 1.11.1986 but in view of the peculiar status accorded to them by treating and keeping them as a separate unit for purposes of seniority,and promotion, etc., most of the Officers / Staff transferred from the erstwhile Legislative Council Secretariat got accelerated promotions.

5. Taking into consideration the developments that had taken place during the past five years and more and applying the principles of Natural Justice, the following norms have been evolved regarding the transfer of the staff of the erstwhile Legislative Council Secretariat and the fixation of their inter se seniority:

The Officers / Staff transferred from the erstwhile Legislative Council Secretariat and who have so far been kept as a separate unit shall be taken in the Legislative Assembly Secretariat with effect from the date of issue of this order and placed as the junior most in the respective categories irrespective of the dates of their appointment to the said categories in the Legislative Council Secretariat but subject to the exceptions listed below: (for the sake of easy reference, the Officers and staff of the Legislative Assembly Secretariat are referred to as 'A' Wing staff and those belonging to the erstwhile Legislative Council Secretariat and transferred to the Legislative Assembly Secretariat as 'B' Wing Staff)

(i) Persons who got promotions in any category in the 'B' wing after 1.11.1986 shall continue in the promoted category without any reversion. The promotions shall be treated as personal to them but such persons shall be placed below the junior most person in the respective categories in the 'A' wing.

(ii) Persons who were promoted to any higher category but subsequently reverted for want of vacancy shall be placed as the senior most in the lower category. This principle shall be applicable to all the officers/staff irrespective of the fact whether they belong to the 'A' Wing or 'B' wing. The inter se seniority of such persons shall be fixed with reference to the date of their promotions to the higher category.

(iii) The seniority of persons belonging to any category in 'A' and 'B' wings who did not get any promotion after 1.11.1986 shall be fixed with reference to the total service rendered by them in the said category.

(iv) Where a list of persons considered fit for promotions to a higher category had been drawn in respect of any category, it shall be operated, provided a period of one year had not elapsed since the approval of the said list. In case a period of one year had elapsed, a fresh list shall be drawn up.

(v) In respect of Reporters their inter se seniority should be fixed with reference to the date of their appointment in the

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category in Legislative Assembly Secretariat / erstwhile Legislative Council Secretariat."

1.6 So far as the two writ petitioners are concerned, it was indicated as hereunder :-

"(f) SECTION OFFICERS

. . .

Tmt.N. Meenakshi and Tmt.B. Saraswathi were holding the post of Assistant Section Officers in the 'B' Wing at the time of their transfer in the Legislative Assembly Secretariat. They were promoted subsequently as Section Officers. They shall, therefore, be ranked as the junior to Tmt.S.H. Saleem Unissa in the category of Section Officer. The seniority of Tmt.N. Meenakshi and Tmt.B. Saraswathi in the category of Section Officer shall be as follows:-

1. Tmt.N. Meenakshi
2. Tmt.B. Saraswathi"

1.7 Thereafter, representations were made by two writ petitioners. The request in such representation claiming seniority over the other Section Officers was turned down by letter dated 20.7.1993. Thereafter, two writ petitions were filed for quashing S.O.Ms.No.190 dated 16.9.1992 and the subsequent letter dated 20.7.1993, where under the representations were rejected.

2.The main contentions raised in the writ petitions are to the effect that the two petitioners had been appointed on regular basis by exercising the power to relax as contemplated under Rule 47 of the Tamil Nadu Legislative Assembly Secretariat Service Rules and thereafter they were promoted as Section Officers and the respondents in the writ petitions were admittedly promoted as Section Officers on subsequent dates and, therefore, the two writ petitioners should be treated as seniors, particularly in view of the provisions contained in Rule 20 of the Tamil Nadu Legislative Assembly Secretariat Service Rules.

3. Counter affidavits were filed on behalf of Legislative Assembly Secretariat as well as the private respondents in those writ petitions.

3.1 In the counter affidavit filed by Legislative Assembly Secretariat, it was indicated that prior to abolition of the Legislative Council, the officers and staff of the Legislative Council Secretariat were governed by a separate set of Rules called as Tamil Nadu Legislative Council Secretariat Service Rules" and even though the work in both the Secretariats i.e.,Secretariat of the Legislative Assembly and the Secretariat of Legislative Council were similar, the employees were borne in separate cadres. It was indicated that since the Legislative Council was to be abolished, in normal course, the employees of the Secretariat of Legislative Council would have faced retrenchment, but a decision was

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taken to absorb them in different organizations and many of the employees were thus absorbed in the Assembly Secretariat. At that stage, it was decided in the High Level Committee to keep persons absorbed in the Legislative Assembly Secretariat as a separate unit and it was further decided that the posts were to be created for accommodating the officers of 'B' wing (Those who were to be absorbed in the Legislative Assembly Secretariat). It was further indicated :-

> "10. As the decision taken at the meeting of the High Level Committee to the effect that the posts held by Officers of 'B' wing should be allowed to lapse when they retired was not implemented, the entire 'B' Wing Officials got accelerated promotions. In fact, one Deputy Secretary who should have retired in the same category, actually got promoted as Joint Secretary and later as even Secretary to the Assembly Secretariat, before his retirement. It may be noted that not only was the post of Secretary ('A' Wing post) filled up by appointing a Joint Secretary from the 'B' Wing, but even the resultant vacancies were also filled up from the 'B' Wing Officers only."

3.2 It was further stated that because of this, many persons belonging to 'B' wing get accelerated promotion. Therefore, with a view to find out equitable solution, after much deliberation, the policy decision as reflected in S.O.Ms.No.190 was taken. It was further stated that appointment of the writ petitioners was not in accordance with the Tamil Nadu Legislative Assembly Secretariat Service Rules and, therefore, Rule 20 of such Rules was not applicable initially and only it became applicable after the amalgamation of 'A' and 'B' wings with effect from 16.9.1992 by virtue of the order issued in S.O.Ms.No.190. In the counter affidavit it was also indicated in great detail as to how the persons who had come from Legislative Council Secretariat got frequent promotions as compared to those originally appointed in Legislative Assembly Secretariat. It was further indicated that with a view to create more opportunity of promotion and for mitigating the grievance of the staff, the Government created new posts.

3.3 In the counter affidavit filed by the other respondents in those writ petitions, a similar stand had been taken.

4. Learned single Judge has allowed the writ petitions by observing that as per Rule 20, seniority is to be determined on the basis of the date of commencement of service. Against such order, Writ Appeal Nos.1202 and 1208 of 1997 have been filed by the private respondents in W.P.Nos.17084 and 17085 of 1993, whereas the connected two writ appeals W.A.Nos.1165 and 1160 of 1998 have been filed by the Legislative Assembly Secretariat.

5. Learned counsels appearing for the appellants have raised the following contentions :-

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Two writ petitioners were serving in the Legislative Council Secretariat and in normal course on the abolition of the Legislative Council such persons would have faced retrenchment, but on compassionate ground they were absorbed by relaxation of rules and because they were considered as part of a separate unit, they got accelerated promotion. Two units were integrated for the first time on issuance of S.O.Ms.No.190 and, therefore, inter se seniority between employees of the two wings, which became integrated for the first time after issuance of S.O.Ms.No.190, is to be decided on the basis of the order contained in S.O.Ms.No.190 and such petitioners cannot be treated as seniors and Rule 20 is not applicable to such peculiar case.

6. Learned counsel appearing for the respondents Meenakshi and Saraswathi (two writ petitioners), on the other hand, submitted that after being absorbed in the Legislative Assembly Secretariat as Assistant Section Officers, their past seniority and increments were respected and the two writ petitioners were given increments on due dates by taking into consideration their previous service and thereafter both of them were promoted as Section Officers before the appellants in W.A.Nos.1202 and 1208 of 1997 were promoted as Section Officers and, therefore, they must be treated as senior as Section Officers. It has been further submitted by him that even though in S.O.Ms.No.245 dated 31.10.1986 it was contemplated that there would be separate unit and Rules would be amended, Tamil Nadu Legislative Assembly Secretariat Service Rules having not been amended, Rule 20 is applicable and, therefore the two writ petitioners must be treated as senior by virtue of Rule 20.

7. Rule 20 of the Tamil Nadu Legislative Assembly Secretariat Service Rules, being relevant, is extracted hereunder :-

> "20. Seniority:- (a) The seniority of a member of the service or class or category shall, unless he has been reduced to a lower rank as a punishment be determined by the date of his first appointment to the service, class or category. If any portion of the service of such person does not count towards probation under the rule 17, his seniority shall be determined by the date of commencement of the service which counts towards probation.
>
> (b) Subject to these rules, the appointing authority may, at the time of passing an order appointing two or more persons simultaneously to any category of the service, fix the order of seniority among them.
>
> (c) Where a member of any category has been reduced to a lower category, he shall, in the absence of a special order to the contrary, take the first rank among the members in the latter."

8. Learned counsel appearing for the appellants have placed reliance upon several decisions in support of their contentions.

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8.1 In (1991) 1 SCC 189 (GURMAIL SINGH AND OTHERS v. STATE OF PUNJAB AND OTHERS), the appellants before the Supreme Court were in service as Tubewell Operators in the Irrigation Branch of the Public Works Department of the Punjab State. The government took a decision to transfer all the tubewells in Public Works Department to Punjab State Tubewell Corporation, a company wholly owned and managed by the State of Punjab and accordingly the appellants were served with a notice in terms of Section 25-F of the Industrial Disputes Act terminating their services on the ground of abolition of posts. The contention of the appellants was to the effect that the State was bound to protect continuity of service of such persons and the Punjab State Tubewell Corporation was under the obligation to employ such appellants with continuity of service under the same terms and conditions. During pendency of the proceedings in the High Court, the appellants had been employed as fresh entrants under the Corporation. The main contention of the appellants was therefore regarding continuity of service and seniority, etc. The Supreme Court observed :-

> "17... Acting as a model employer, which the State ought to be, and having regard to the long length of service of most of the appellants, the State, in our opinion, should have agreed to bear the burden of giving the appellants credit for their past service with the Government. That would not have affected the Corporation or its employees in any way - except to a limited extent indicated below - and, at the same time, it would have done justice to the appellants. We think, therefore, that this is something which the State ought to be directed to do.
>
> 18. We would, however, like to clarify that the sole purpose and object of our above direction is that the appellants should be entitled to count their past service with the Government for the purpose of computation of their salary, length of service and retirement benefits with the Corporation. This, however, should not result in the appellants' claiming any seniority over the staff which the Corporation has otherwise engaged right from its commencement in 1970. To permit such a claim would result in injustice to those employees whose seniority is based on their terms and conditions of service with the Corporation which had been entered into a long time before the present transfer proposal came to be implemented. Though, as we have mentioned earlier, seniority in service is not of much importance in this case as there is no avenue of promotion to tubewell operators, the question of seniority still becomes crucial in case the Corporation should close down any of the tubewells or decide on the retrenchment of its staff by reorganising the operation of tubewells in such a way that some of the staff may become surplus. In such an event, if the appellants are given the benefit of their length of service with the Government for all purposes, some of the present employees of the Corporation may become liable to be retrenched as junior in length of service to

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some of the appellants. Clearly, this should not be allowed to happen and the Corporation staff should not suffer merely because the appellants, who have been subsequently inducted into the Corporation, are given all the benefits of the length of their service with the Government. There can be no question of any of the appellants being considered senior to such operators on the Corporation's establishment. In fact we cannot give such a direction without giving such operators an opportunity of being heard. We would, therefore, like to make it clear that, while the appellants will have for purposes of computation of their salary, length of service and retirement benefits the advantage of counting the period of their service with the Government, this will not enable them to claim any seniority over the former employees of the Corporation."

9. In (1997) 3 SCC 32 (STATE OF PUNJAB ANDO THERS v. HARNAM SINGH AND OTHERS), the respondents before the Supreme Court had joined service as drawing teachers in the District Boards and Zilla Parishads schools. Subsequently such schools were taken over by the Government of Punjab. At the time of taking over, two of the conditions enumerated in the deed of take-over were:-

" 3. ... "3. The Government shall not be bound to take in government service the members of the staff of the school and shall have full discretion in taking over such of them in government service as may be considered suitable by it (Govt.)

(4) The members of the staff who are taken in government service by the Government under the preceding clause shall be treated as fresh entrants in government service and no credit whatsoever of their previous service in the aforesaid school shall be allowed to them and their seniority vice versa. The old government servants shall be treated accordingly."

9.1. The question before the Supreme Court was whether past service should be counted towards seniority. The Supreme Court observed :-

"4. The question, therefore, is whether the view of the High Court that the previous service rendered by the respondents / erstwhile teachers in District Boards and Zilla Parishads would be counted for the purpose of seniority and other benefits, is correct in law. In view of the aforesaid clauses, it would be abundantly clear that the Government has been given the discretion to take any of the existing members into the service and if so taken, they shall be treated as fresh entrants into the government service vis-a-vis the existing government employees. It would be reasonable to conclude that the Government have taken over the schools run by the District Boards and Zilla Parishads as government schools with the aforesaid conditions to safeguard the service conditions of the existing employees of the Government vis-a-vis the new entrants.

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Under those circumstances, the staff working in the former Zilla Parishads or Boards taken over by the Government would be treated as fresh entrants into the government service from the date of taking over. Therefore, the previous service rendered by them would not be counted for seniority etc. It would also be clear that unless there was a condition at the time of take-over to treat the previous service of the employees as part of service under the government service, it would not be counted. In other words, it will be subject to the terms of take-over."

10. In (1997) 5 SCC 81 (V.K. DUBEY AND OTHERS v. UNION OF INDIA AND OTHERS), it was observed :-

"3. The appellants were initially drafted on the diesel side of the locomotive operations. Subsequently, on introduction of electrical engines they were given training and were absorbed on the electrical locomotive side. The question of inter se seniority of employees already working on the electrical locomotive side and those shifted from the diesel locomotive side to the electrical locomotive side had arisen. The Tribunal has held that since they were deployed to the electrical side for the first time, their seniority was required to be adjudged from the date of their deployment in the electrical locomotive operations and the previous service cannot be counted for the purpose of determination of inter se seniority. This controversy was considered by this Court in Rama Kant Chaturvedi v. Divisional Supdt., Northern Railway [1980] Supp. SCC 621 wherein this Court had held as under :

"The Diesel Unit of the Railways was constituted for the first time apart from the Steam Unit already existing. The two units were treated as separate and distinct having different avenues of promotion. As considerable time might elapse before Diesel Cleaners could be promoted as Shunters and Drivers' Assistant in the diesel unit it was decided to draft Firemen on the steam side, possessing the minimum educational qualification of matriculation, to the diesel side as Drivers' Assistants after giving them the requisite training. That was done. All the initial appointments were on officiating basis. As a result of the appointments, some Firemen Grade 'C (the appellants), who were of lower category than Firemen Grade 'B' and Firemen Grade 'A' but who happened to possess the minimum educational qualification which many of the Firemen Grades 'A; and 'B' did not possess, were drawn into the diesel unit earlier than some of the Firemen Grades 'A' and 'B' who came in later as a result of the relaxation of the rule prescribing minimum educational qualification. The Railway Administration issued

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instructions that the junior most Firemen Grade 'C officiating as Diesel Driver Assistant should be reverted in order to accommodate the senior staff. Pursuant to these instructions the appellants, all of whom were drawn from the category of Firemen Grade 'C' and who had been appointed as officiating Drivers Assistants, were reverted to the steam side as Firemen Grade 'C' in order to make way for Firemen Grades 'A' and 'B' who were appointed as Drivers' Assistants on the diesel side long after the appointment of the appellants as Drivers' Assistants on the diesel side, Questions for determination were whether the earlier appointees could claim seniority over the later appointees and whether the Railway Administration was justified in reverting the appellants to the old unit. Allowing the appeals the Supreme Court held:

"Those who were drafted into the diesel unit earlier would not lose the benefit of their continuous service on the diesel unit merely because the appointments were on an officiating basis and because others who were senior to them on the steam side came in or chose to come in at a later stage. If seniors on the steam side did not come in earlier it was because they were barred from coming in by the requirement of a minimum educational qualification. The subsequent relaxation of the rule cannot enable them to take a 'frog leap' over the heads of those who had come into the diesel side earlier. The seniority on the steam side is of no relevance in determining seniority on the diesel side when they are appointed on the diesel side on different days."

4. The ratio therein was followed by another Bench of this Court in South Eastern Railway through Chief Personnel Officer and Ors. v. Ramanarain Singh and Ors. Etc. (C.A. No. 2530/81), and batch, dated July 29, 1988.

5. Shri Vijay Bahuguna, learned senior counsel appearing for the appellants, contends that since they had been working on the diesel side for a long number of years, merely because they were sent to training for three months to be absorbed in the electrical locomotive operations, their entire previous length of service cannot be wiped out causing detriment to their length of service and promotional avenues on account of the change in the policy. Therefore, the view taken by this Court requires reconsideration. We find no force in the contention. It is seen that the diesel engine drivers and the staff working with them operates in one sector, namely, diesel locomotive sector, while

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electrical engine drivers and the staff operating on the electrical engines operate on a different sector. Consequent upon the gradual displacement of diesel engines, instead of retrenching them from service they were sought to be absorbed by giving necessary training in the trains operating on electrical energy. As a consequence, they were shifted to a new cadre. Under these circumstances, they cannot have a lien on the posts on electrical side nor they be entitled to seniority over the staff regularly working in the electrical locomotives detriment. Under those circumstances, this Court has held that they cannot have a seniority over them. However, the Tribunal in the impugned order has well protected the rights which they had already accrued as under:

We have been informed by the departmental representative that on such a re-determination of the seniority a large number of convertees who have already advances several steps in the electrical side would face reversion resulting in not only hardship to such individual but also functional problem in running the Locomotives. We, therefore, provide that on such re-determination of seniority, the persons who have already been promoted to higher grades in Electrical side, shall not be reverted but their subsequent advancement to still higher grades shall be dependent on such re-determined seniority. However, no further promotions shall be made by the respondents, in the electrical side in contravention of the aforesaid principle of seniority.

6. In view of the above direction, the accrued rights are protected and being enjoyed by the appellants. The Tribunal's order, therefore, directed to safeguard the rights already had by the appellants. However, future promotions depend upon the inter se seniority that may be determined by the authorities as directed by the Tribunal. Thus we find no flaw in the order passed by the Tribunal warranting interference."

11. In (2001) 10 SCC 397 (DEV RAJ GUPTA v. STATE OF PUNJAB AND OTHERS), a clerk in the office of the District and Sessions Judge got selected and appointed to the post of Clerk in the Office of Deputy Excise and Taxation Commissioner and subsequently he claimed that his past services should be counted towards his seniority. Such contention was repelled by the High Court. In the appeal, it was observed :-

3. It is contended before us that though the order of appointment indicates to be a case of recruitment but factually it was a case of transfer from one department to the other and therefore the appellant is entitled to count the past service rendered by him in the Office of the District & Sessions Judge for the purpose of seniority in the Office of Deputy Excise and Taxation Commissioner. We are unable to accept this submission

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of the learned Counsel for the appellant. The recruitment to the different posts in the Office of the Excise and Taxation Commissioner is governed by a set of Rules framed under Article 309 of the Constitution of India called "The Punjab Excise and Taxation Department Subordinate Officers (Ministerial Class III Service Rules". "Service" has been defined in Rule 2(h) to mean the Punjab Excise and Taxation Department Subordinate Offices (Ministerial) Class III Service. Rule 3 indicates that the service shall comprise of the posts shown in Appendix-A. Rule 10 is the Rule determining the seniority which states that the seniority inter se of the members of the services shall be determined by the dates of their continuous appointments in the service. In that view of the aforesaid statutory provision dealing with the seniority of the members of the service, it is difficult to accept the contention of the learned Counsel for the appellant that the past period rendered by the appellant in the Office of the District & Sessions Judge should also be counted for the purpose of seniority. The appellant must be held to have joined the services only, on the basis of the letter of appointment on 4th January, 1977 and therefore, any services rendered prior to that date in any other department/organization cannot qualify for counting the seniority of the appellant in the office of the Deputy Excise and Taxation Commissioner. In this view of the matter, we see no infirmity with the impugned judgment requiring our interference under Article 136 of the Constitution. The civil appeal is accordingly dismissed."

12. Learned counsel appearing for the two writ petitioners (contesting respondents in the appeals), has submitted that no circular or notification can be substitute to the statutory rules framed and, therefore, in the face of Rule 20, the subsequent order in S.O.Ms.No.190 cannot have the effect of denying the petitioners their seniority as they were promoted as Section Officers earlier than the appellants. He has placed reliance upon the judgment of the Supreme Court in JT 2001 (4) SCC 538 (Dr.RAJINDER SINGH v. THE STATE OF PUNJAB & OTHERS), wherein it was observed:-

"6. We do not agree with the High Court that even without amending the Rules, the respondent-State could have declared the PCMS Class II as PCMS Class I. The notification dated 9th April, 1989 reads as:

"In pursuance of the recommendations of the Committee for the removal of anomalies in the revised scales of pay of Punjab Civil Medical Services, the President of India is pleased to declare the PCMS (Class II) as PCMS (Class I). There will be only one service with the nomenclature of PCMS (Class I) with effect from 1.1.1986. The necessary amendments in the Service Rules of PCMS (Class II) and PCMS (Class I) will be made separately.

This issues with the concurrence of the Finance

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Department conveyed vide their I.D.No.10/27/89 - FPI, dated 20.3.89." (Emphasis supplied)

A perusal of the notification clearly indicates that the Government itself was aware that the two classes of service cannot be equated or treated alike without amending the Rules. There is no dispute that the Rules have not been amended so far. The Departmental Promotion Committee, therefore, erred in recommending the promotion of respondent no.3, ignoring the Rules and only relying upon a notification.

7. The settled position of law is that no Government Order, Notification or Circular can be a substitute of the statutory Rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence. We are of the firm view that the High Court was not justified in observing that even without the amendment of the Rules, the Class II of the service can be treated as Class I only by way of notification. Following such a course in effect amounts to amending the Rules by a Government order and ignoring the mandate of Article 309 of the Constitution."

13. In this connection he has also placed reliance upon the decision of the Supreme Court reported in JT 2001(4) SC 406 (N.K. PANKAJAKSHAN NAIR v. P.V. JAYARAJ & OTHERS), wherein it was observed :-

"9. Having examined the provisions of the recruitment Rules of 1966 as well as the executive instructions of the year 1962, we are unable to find any provision in the statutory Rules which can be said to be repugnant to the earlier executive order. That apart, the said executive order continues to remain in force by various amendments, though the very Clause has not been amended. In this view of the matter, the executive order of 1962 must be held to be continuing in force and remains operative. We are not examining the question as to whether Clause (d) really is in the nature of a quota meant for a particular category of employees as contended by Mr. Ramachandran, since in our view, on construction of the relevant provisions of the statutory Rules providing different sources of recruitment for filling up the post of DSP read with the so called administrative order of the year 1962, the appellant can certainly claim a right of consideration and in fact, such right did emanate when the Director General of Police wanted his option for being considered and finally he was excluded from consideration on the basis of Ext.P-10, a suggestion to the Government for deletion of Clause (c) from the statutory Rules. <u>There cannot be any manner of doubt that the provisions of statutory Rules cannot be taken away by a suggestion of the executive until and unless the Rules are appropriately amended...."</u>

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14. Similar view has been expressed in AIR 1990 SC 463 (C.L. VERMA v. STATE OF M.P. AND ANOTHER), where it was observed :-

> "6. The question which arose for consideration in the writ petition before the High Court at the instance of the appellant was whether in the face of the mandate in R. 29 the administrative order could operate. It is not the stand of the State Government that the order dated 15th of May,. 1981, is one under the proviso to R. 29. In fact, the tenor of the proviso clearly indicates that it is intended to cover specific cases and individual employee. An administrative instruction cannot compete with a statutory rule and if there be country provisions in the rule the administrative instructions must give way and the rule shall prevail. We are, therefore, of the view that the appellant, in terms of R. 29, ceased to be a Government employee on his attaining the age of 58 years, two days prior to the order of dismissal. In view of the fact that he had! already superannuated, Government had no right to deal with him in its disciplinary jurisdiction available in regard to employees. The ratio of the decision in R. T. Rangachari v. Secretary of State for India in Privy Council, 64 Ind. App. 40: (AIR 1937. PC 27) supports the position."

15. Learned counsel appearing for the contesting respondents has also submitted that the Governor had the jurisdiction to relax the method of appointment and it was so done in S.O.Ms.No.245 dated 31.10.1986 and such relaxation must be held to be valid in view of the decisions of the Supreme Court reported in JT 1990(1) SC 278 (J.C. YADAV & OTHERS v. STATE OF HARYANA) and AIR 1973 SC 441 (BACHAN SINGH v. UNION OF INDIA), which has been subsequently followed in 1983 II SLR 113 (A. JANARDHANA v. UNION OF INDIA).

16. Learned counsel for the contesting respondents has submitted that the previous service rendered by the two writ petitioners in an equivalent cadre should be taken into account on their subsequent absorption in the Legislative Assembly Secretariat. He has placed reliance upon the decision of the Supreme Court reported in JT 1999(9) SC 597 (S.I. ROOPLAL AND ANOTHER v. Lt. GOVERNOR THROUGH CHIEF SECRETARY, DELHI AND OTHERS), wherein it was observed :-

> "15. We will not take up the question whether the appellants are entitled to count their service rendered by them as Sub-Inspector in the BSF for the purpose of their seniority after absorption as Sub Inspector (Executive) in Delhi Police or not. We have already noticed the fact that it is pursuant to the needs of Delhi Police that these officials were deputed to Delhi Police from the BSF following the procedure laid down in Rule 5(h) of the Rules and subsequently absorbed as contemplated under the said Rules. It is also not in dispute that at some point of time in the BSF, the appellants' services were

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regularised in the post of Sub-Inspector and they were transferred as regularly appointed Sub-Inspectors to Delhi Police force. Therefore, on being absorbed in an equivalent cadre in the transferred post, we find no reason why these transferred officials should not be permitted to count their service in the parent department...."

17. Learned single Judge has applied the provisions contained in Rule 20 to come to the conclusion that the two writ petitioners having been appointed as Section Officers earlier to the private respondents in such writ petitions, the writ petitioners should be treated as seniors in view of Rule 20.

18. Two writ petitioners were appointed to the Tamil Nadu Legislative Assembly Secretariat by virtue of the order passed in S.O.Ms.No.245 dated 31.10.1986. Such appointments were made against the additional posts created by virtue of S.O.Ms.No.244 dated 31.10.1986. Such S.O.Ms.No.244 itself indicates that sanction was accorded for employment for a period of one year or till the necessity ceases, whichever is earlier. Paragraph 4 of such order clearly indicates that the expenditure on the accounts constitutes an item of "New Service". By S.O.Ms.No.245 dated 31.10.1986, it was decided to fill the said posts from among the officers and staff of the Legislative Council Secretariat consequent on the abolition of the Legislative Council. Paragraph 3 of S.O.Ms.No.245 clearly indicates that the persons so appointed from the Legislative Council Secretariat consequent on the abolition of the Legislative Council will constitute a separate Unit in the Tamil Nadu Legislative Assembly Secretariat for the purpose of seniority, promotion, etc.

19. Two writ petitioners were appointed as Assistant Section Officers. No where in such S.O.Ms.No.245 dated 31.10.196 it has been indicated that appointment of such persons shall be deemed to be in continuation of the earlier appointment. Obviously the appointment must be taken to be a fresh appointment. As a matter of fact, the very appointment order also indicates that Rule 47 was relaxed by the Governor, which prima facie indicates that such appointment was considered as a fresh appointment and not on deputation nor it can be said that two services, one under the Tamil Nadu Legislative Assembly Secretariat and the other under the Tamil Nadu Legislative Council Secretariat, were merged. The tenor of the orders issued and the background clearly indicate that as the Legislative Council was abolished, many of the employees under the Tamil Nadu Legislative Council Secretariat were given appointment in the Tamil Nadu Legislative Assembly Secretariat. It is obvious that if such appointment would not have been made, the erstwhile incumbents of the Legislative Council Secretariat would have been terminated from service on account of abolition of the post. If there would have been merger of two services, relevant provision could have been made protecting their past service for all purposes, including inter

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se seniority between the original employees of the Tamil Nadu Legislative Assembly Secretariat and such appointees from Tamil Nadu Legislative Council Secretariat. The contents of paragraph 3 of such order would rather indicate that there was no merger of two services.

20. It is of course true that two writ petitioners were promoted as Section Officers earlier than the original employees of the Tamil Nadu Legislative Assembly Secretariat. However, it cannot be said that such promotion was on regular basis by considering both the Wings as part of the same service. On the other hand,as per paragraph 3 of S.O.Ms.No.245 it is evident that two Wings were kept separate. It is obvious that at that stage the original employees of the Tamil Nadu Legislative Assembly Secretariat had raised various objections and the matter was being considered and ultimately the impugned order was issued. The two services can be said to have got merged together only on issuance of the impugned order. Appointment of the two petitioners as Assistant Section Officers in the Tamil Nadu Legislative Assembly Secretariat took place for the first time on 1.11.1986. There is nothing in S.O.Ms.No.244 or S.O.Ms.No.245 to suggest that past services are protected for inter se seniority, though such past services were counted for the purpose of increments. Since the two petitioners and several others were absorbed on abolition of the Legislative Council, for the purpose of inter se seniority between them and the original employees of the Tamil Nadu Legislative Assembly Secretariat, it must be taken that their seniority is to be counted from the date of their first entry into service. Subsequent promotion of the two petitioners in 1988, while they were considered as part of the separate Wing,cannot confer them seniority over other persons. Since the two services had not been merged by the said date and it can be said that for the first time the two services got merged after issuance of the impugned order, Rule 20 can be made applicable only after such merger.

21. It is no doubt true that two petitioners had entered into service under the Tamil Nadu Legislative Council Secretariat earlier than the contesting unofficial respondents in the writ petitions and they were otherwise senior in that sense. However, on abolition of the Tamil Nadu Legislative Council Secretariat, they had no right to continue in service and on abolition of the post such incumbents could have been legally terminated from service, but a concession was shown to them by repatriating some of them to the Secretariat or other departments and by appointing many of them in the Tamil Nadu Legislative Assembly Secretariat. But, no where it was contemplated that they will join the new service along with their past seniority to the utter prejudice to the original incumbents in the Tamil Nadu Legislative Assembly Secretariat.

22. It is no doubt true that appointment was made by invoking the provisions contained in Rule 47. In view of such, the appointment of those persons belonging to the erstwhile Tamil Nadu legislative Council Secretariat can be considered as valid, but the entry into service was obviously with effect from 1.11.1986 and not earlier. In that sense they

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could not have been treated as senior as Assistant Section Officer as compared to the existing original incumbents in the Tamil Nadu Legislative Assembly Secretariat. The subsequent promotion in 1988 under extremely fortuitous circumstances cannot be utilized by them to steal a march over their counterparts in the Tamil Nadu Legislative Assembly Secretariat. It is no doubt true that in S.O.Ms.No.245 it was indicated that the persons appointed from the Legislative Council Secretariat will constitute a separate Unit in the Tamil Nadu Legislative Assembly Secretariat for the purpose of seniority, promotion, etc. However, it has been no where contemplated that they would be considered as seniors among the existing incumbents.

23. This is not a case where the two petitioners had come on deputation and subsequently absorbed nor this is a case where they have been transferred to Tamil Nadu Legislative Assembly Secretariat in public interest requiring protection of their previous service. This is a case where, but for the issuance of S.O.Ms.Nos.244 and 245, such persons would have been out of service on account of abolition of the Tamil Nadu Legislative Council Secretariat and, therefore, their entry into Tamil Nadu Legislative Assembly Secretariat should be considered as a fresh appointment for the purpose of considering the inter se seniority, though their past services can be considered for all other purposes such as increments and pension. However,
counting past service towards their seniority would cause great injustice to the original incumbents of the Tamil Nadu Legislative Assembly Secretariat and, therefore, the impugned order passed by the Government in S.O.Ms.No.190, after much deliberation can be considered to be a reasonable one and not arbitrary requiring any interference.

24. It was contended that in the absence of any Rule, the executive instruction or principle decided under the impugned S.O.Ms.No.190 cannot derogate from the provisions contained in Rule 20. However, since there was no merger of two services before the impugned order, the question of applying Rule 20 would arise only after two services were merged together and not otherwise.

25. For the aforesaid reasons, we are unable to sustain the order passed by the learned single Judge. The appeals are therefore allowed and the writ petitions are liable to be dismissed. It is however made clear that if during pendency of the writ petitions any promotion had been effected on the basis of the order passed by the learned single Judge or subsequently on the basis of the interim orders passed by the Court, such

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promotees may not be reverted and can be allowed to continue as special case by creating supernumerary posts, if necessary. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

dpk

To

The Secretary,
Legislative Assembly Secretariat,
Fort St. George, Madras 9.

+ 2 CCs to M/s.Aiyar and Dolia, Advocate SR NO29892

+ 2 CCs to Mr.S.Vadivelu, Advocate SR NO 29616

WA.NOs.1202 & 1208/97
and 1165 & 1166/1998

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